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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 72-99

PHILLIP LUTHER,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Phillip Luther v. State of Alabama, 8th Division, 75, 259 So. 2d 857. Certiorari was denied, 259 So. 2d 862.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Criminal Appeals of Alabama rendered on January 11, 1972. Application to the Court of Criminal Appeals of Alabama for rehearing was denied on February 8, 1972. A petition to the Supreme Court of Alabama for writ of certiorari was denied on March 30, 1972. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTION PRESENTED

Does the use of special prosecutors, as Assistants to the District Attorney, violate rights of defendant as to due process of law, there being no objection thereto at trial, on motion for new trial or on appeal?

IV

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States, Section 1.

V

STATEMENT

Petitioner Phillip Luther, a white man, was convicted in the Circuit Court of Marshall County, Alabama, Albertville

Division, of second degree arson and sentenced to four years imprisonment.

VI

SUMMARY OF ARGUMENT

Use of special prosecutors as Assistants to the District Attorney, with District Attorney being present at trial, does not violate any constitutional rights of accused, particularly if there was interposed no objection at trial, on the motion for new trial or on appeal.

VII

ARGUMENT

The record does not support the petitioner's claim.

It is essential to the jurisdiction of this Honorable Court that a substantial federal question have been properly raised in State court proceedings. And, while a petitioner is not bound to follow any particular form of words or phrases, it is essential that he bring the federal claim and the grounds therefor to the State court's attention with fair precision.

In *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655, it was stated that "the jurisdiction of this court to reexamine a final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert such a Federal right."

Actually, the only mention of Mr. Clark Johnson's being Eddie Scott's attorney was as follows:

"Q. Did you contact any attorney?

"A. Yes, sir.

"Q. Who was your attorney?

"A. Mr. Johnson.

"Q. Mr. Johnson is your attorney?

"A. Yes, sir.

"Q. And what charges have been placed against you, if any?

"A. Second degree arson.

"Q. Have you been indicted by the grand jury?

"A. No sir.

"Q. You haven't appeared before them and you weren't indicted?

"A. No, sir." (R. p. 71)

* * * * *

On argument to the jury:

"Mr. Floyd: Eddie Scott went down to the police station when they told him he was under arrest, and he took his lawyer, Mr. Clark Johnson, with him.

"Mr. Johnson: We object to that, Your Honor. There is no evidence of that.

"The Court: Sustained." (R. p. 220)

* * * * *

On amendment to motion for new trial:

"44. The Court erred in sustaining the State's objection to the following statement made by Defendant's counsel in closing argument to the jury:

"Eddie Scott went down to the police station when they told him he was under arrest, and he took his lawyer, Mr. Clark Johnson, with him." (R. p. 23)

The sustaining of the State's objection was correct as Eddie Scott had testified on Record Page 70 that he took his grandfather with him to the police station.

In argument to the jury the rule is that an attorney cannot be allowed to state anything as a fact to which there is no evidence. *Johnson v. State,* 272 Ala. 633, 133 So. 2d 53. Volume 6A, Alabama Digest, Criminal Law, Section 719(1).

As can be seen from the testimony of Eddie Scott, he testified as to his part in the crime. He had not been indicted and the record shows no promise by the State to grant him any immunity.

There was no objection made at trial, on motion for a new trial, or on appeal to the appearance of Mr. Clark Johnson or Mr. Terry Huffstuttler, Jr., as special prosecutors. The District Attorney, Mr. H. H. Conway was present at trial. Hence, the matter was not presented in State courts on trial or appeal.

The use of special prosecutors is not violative of defendant's rights as to due process of law.

In the case of *Alonzo v. State Ex Rel. Booth*, 283 Ala. 667, 219 So. 2d 858, cert. denied 396 U. S. 931, 90 S. Ct. 269, 24 L. Ed. 2d 229, the matter was discussed as follows:

> "Special counsel may appear in the prosecution as an assistant to the solicitor and with the consent of the court. The management of the case remains with the official representative of the state, in whose name the special counsel appears. The consent of the state is all the authority needed by special counsel; hence, a motion by defendant to require special counsel to show his authority is properly overruled. Handley v. State, 214 Ala. 172, 174, 106 So. 692, 694."

Respondent submits that use of the special prosecutors was not error. First, no federal question was raised in the State courts and secondly, use of special prosecutors is not violative of due process.

VIII

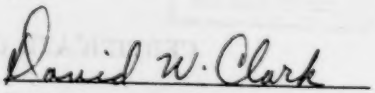
CONCLUSION

For the foregoing reasons, respondent submits that petitioner was indicted, tried and sentenced properly and that the constitutional rights of said petitioner were not violated. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

William J. Baxley

WILLIAM J. BAXLEY
Attorney General of Alabama



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IX

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of August, 1972, I served three copies of the foregoing brief and argument of respondent in opposition to petition for writ of certiorari upon the attorneys for petitioner, by mailing said copies in a duly addressed envelope to said attorneys of record as follows:

Arthur Parker, Esq.
J. Louis Wilkinson, Esq.
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